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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ALLEN FONG, Defendant.	CASE NO. CR 14-527 RS **UNITED STATES' REPLY IN SUPPORT OF APPLICATION OF THE UNITED STATES FOR A PRELIMINARY ORDER OF FORFEITURE**

In its opposition to the government's forfeiture application, the defense makes three arguments: (1) following the reasoning in Cano-Flores[1], only the proceeds Fong personally obtained may be forfeited; (2) the government's forfeiture estimate is not reasonable; and (3) the forfeiture sought by the government is "grossly disproportionate" to the offense, and it therefore constitutes an excessive fine.

As discussed below, these arguments are not persuasive because: (1) Ninth Circuit law mandates joint and several forfeiture for the proceeds obtained by the conspiracy as a whole, and even under the reasoning in Cano-Flores, Fong "obtained" the proceeds received by his employees. Further, Honeycutt[2]

[1] United States v. Cano-Flores, 796 F.3d 83, 85, 94 (D.C. Cir. 2015).

[2] United States v. Honeycutt, 816 F.3d 362, 369 (6th Cir. 2016)

relies on Cano-Flores, and it is distinguishable from the instant matter because Fong was the head of the criminal enterprise, and he profited from each and every sexual encounter; (2) the forfeiture amount is based on the conspiracy's own records and admissions, and the defense has provided no evidence to the contrary; and (3) forfeiture of the proceeds of the very serious crimes to which Fong has pled, which are less than half of the maximum fine allowed by 18 U.S.C. § 1963(a), is directly proportional to the gravity of the offense, not grossly disproportionate.

I. Ninth Circuit Law Mandates That Defendants Are Joint and Severally Liable for Proceeds Obtained by the Conspiracy, and United States v. Honeycutt is Distinguishable on the Facts

It is undisputed under Ninth Circuit law that the "proceeds" of a crime are "all property obtained, directly or indirectly, from the commission of the crime" which includes the property "obtained by the conspiracy as a whole," and "[i]t does not matter that [the defendant] personally profited very little." United States v. Newman, 659 F.3d 1235, 1244 (9th Cir. 2011); *see also* United States v. Casey, 444 F.3d 1071, 1076 n.4 (holding that the defendant must forfeit the full $7,000 that he received from the drug transaction even though he paid his drug boss $6,800 and "profited" only $200). Furthermore, "'proceeds' in the RICO forfeiture statute refers to gross receipts rather than net profits" and "[c]odefendants are properly held jointly and severally liable for the proceeds of a RICO enterprise." United States v. Christensen, 828 F.3d 763, 777, 821-22 (9th Cir. 2016) *quoting* United States v. Simmons, 154 F.3d 765, 769 (8th Cir. 1998). The holding in Newman was recently affirmed in United States v. Beecroft, 825 F.3d 991, 999 (9th Cir. 2016).

Nine other circuit Courts—the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh—also mandate joint and several liability among coconspirators for the proceeds of the conspiracy. *See* United States v. Candelaria-Silva, 166 F.3d 19, 44 (1st Cir. 1999); United States v. Roberts, 660 F.3d 149, 165 (2d Cir. 2011); United States v. Pitt, 193 F.3d 751, 765 (3d Cir. 1999); United States v. McHan, 101 F.3d 1027, 1043 (4th Cir. 1996); United States v. Edwards, 303 F.3d 606, 643-644 (5th Cir. 2002); United States v. Corrado, 227 F.3d 543, 553 (6th Cir. 2000); United States v. Genova, 333 F.3d 750, 762 (7th Cir. 2003); United States v. Simmons, 154 F.3d 765, 769-770 (8th Cir. 1998); United States v. Caporale, 806 F.2d 1487, 1507-1508 (11th Cir. 1986).

The position of the ten Circuit Courts is also in line with the Supreme Court's holding in Pinkerton v. United States, 328 U.S. 640 (1946), which holds that conspirators are liable for the reasonably foreseeable crimes of their co-conspirators. *See* United States v. Hurley, 63 F.3d 1, 22 (1st Cir. 1995). Additionally, the advisory committee's notes to the Federal Rule of Criminal Procedure governing forfeiture proceedings specifically recognize that "[c]riminal defendants may be jointly and severally liable for the forfeiture of the entire proceeds of the criminal offense." Fed. R. Crim. P. 32.2(c) advisory committee's note at 144.5.

The only Circuit to hold otherwise was the D.C. Circuit in United States v. Cano-Flores, the source of the Circuit split relied upon by United States v. Honeycutt. However, Honeycutt and Cano Flores are distinguishable from the instant matter. In Cano-Flores, the defendant was "plaza commander" in Los Guerra, Mexico (population approx. 4,768[3]), working for the Gulf Cartel, the one of the largest and most infamous drug cartels in Mexico. United States v. Cano-Flores, 796 F.3d 83, 85, 94 (D.C. Cir. 2015). Upon his conviction, the government obtained forfeiture of $15 *billion*, the proceeds earned by the entire cartel. Id. at 90. Cano-Flores appealed, arguing the forfeiture was an excessive fine. In remanding the forfeiture order, the D.C. Circuit held that the joint and several calculation erroneously included amounts not "obtained" by Cano-Flores. However, the court specifically stated that, had the proceeds been received by "an employee or other subordinate of the defendant . . . the defendant would normally be seen, as a matter of ordinary language, as having obtained the amount in question." 796 F.3d at 92. Here, unlike *Cano-Flores*, all of the prostitutes were Fong's employees, so even under the logic of *Cano-Flores*, Fong would be liable for all of the proceeds.

Similarly, in Honeycutt, the defendant worked as the salaried employee in charge of sales and inventory in a store owned by his brother. When Honeycutt noticed an increasing number of "edgy looking folks" purchasing Polar Pure, an iodine-based water purification product, Honeycutt called the police to ask if the iodine in Polar Pure could be used to manufacture methamphetamine. The police told him that Polar Pure was being used to manufacture methamphetamine throughout the community and urged Honeycutt not to sell it if he felt uncomfortable about it. United States v. Honeycutt, 816 F.3d 362, 369 (6th Cir. 2016). Upon conviction, the government sought forfeiture of $269,000, the total amount of Polar Pure sold during the conspiracy. Id. The district court sentenced Honeycutt to concurrent terms of 60 months' imprisonment for each count, but declined to order any forfeiture. Id. On appeal, the Sixth Circuit concluded that “it appears that the district court's decision was driven mostly by its determination that Honeycutt did not directly or indirectly reap the proceeds of the criminal enterprise.” Id. a 397. Because the Sixth Circuit holds coconspirators joint and severally liable for the proceeds of the conspiracy, the Circuit Court reversed and remanded for the imposition of forfeiture. Id. at 380. Honeycutt sought cert, citing the Circuit spilt created by Cano-Flores. The Supreme Court granted cert on December 9, 2016. However, unlike Honeycutt, who was a salaried employee who did not “reap the proceeds” of the enterprise, Fong was the leader and organizer who directly benefitted from each and every act of prostitution. Thus even if the Supreme Court were to rule in favor of Honeycutt based on the reasoning in Cano-Flores, this case is clearly distinguishable from either Honeycutt or Cano-Flores.

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[3] *See* http://www.en.nuestro-mexico.com/Tamaulipas/Miguel-Aleman/Los-Guerra/ and http://en.mexico.pueblosamerica.com/i/los-guerra-2/

As the courts of appeals have explained, requiring the government to “prove the specific portion of the proceeds for which each defendant is responsible” would permit defendants “to mask the allocation of the proceeds to avoid forfeiting them altogether.” Corrado, 227 F.3d at 553; Caporale, 806 F.2d at 1507 (same). The government will never have access to the all of the conspiracy’s financial records or payroll. Most criminal organizations don’t report wage and salary information or pay taxes. In fact, many of the records in this case were found in the trash cans of conspirators, which underlines the difficulty obtaining intra-conspiracy financial records. Docket No. 216 3:24-25. Denying forfeiture because “the government cannot prove exactly which defendant received how much of the pot” would “defeat[] the purpose of the [forfeiture] provision.” Caporale, 806 F.2d at 1507.

II. The Amount of the Forfeiture, which was Calculated from the Conspiracy’s Own Records and the Conspirators’ Own Admissions, is Reasonable Given the Available Information

The defendant does not contest that “a district court or jury need only find facts warranting forfeiture by a preponderance of the evidence.” United States v. Christensen, 828 F.3d 763, 822 (9th Cir.

2016) *citing* Libretti, 516 U.S. at 38-39. In determining the amount earned by the conspiracy, courts have understood that the government may not have access to the all of the conspiracy's financial records or a comprehensive list of all of its criminal dealings:

> Conspiracies are, by their nature, shrouded in secrecy and, thus, such evidence may not always be available. Consequently, the law does not demand mathematical exactitude in calculating the proceeds subject to forfeiture. Indeed, because the purpose of forfeiture is punitive rather than restitutive, district courts are not required to conduct an investigative audit to ensure that a defendant is not deprived of a single farthing more than his criminal acts produced.

United States v. Roberts, 660 F.3d 149, 166 (2d Cir. 2011).

Instead, the Court "need only make a *reasonable estimate* of the loss, *given the available information*.'" United States v. Treacy, 639 F.3d 32, 48 (2d Cir. 2011) (*emphasis added*) *quoting* United States v. Uddin, 551 F.3d 176, 180 (2d Cir. 2009); *see also* United States v. Pierre, 484 F.3d 75, 86 (1st Cir. 2007); United States v. Huggins, 392 F. Appx 50, 63 (3d Cir. 2010).

In this case, the government bases its estimate on the best evidence possible: two years of the conspiracy's *own* records and the admissions of three co-conspirators. As discussed in detail in the government's application (Docket No. 216), the government recovered financial ledgers documenting two years of commercial sexual encounters acts of the defendant's prostitution organization. Docket 216-2 ¶ 2, 6-9. The ledgers documented over *ten thousand* commercial sexual encounters during those two years alone. Id. ¶¶8-9. Each of the encounters listed in the ledgers listed the date, time, duration of the sexual encounter—which was either a half hour or an hour—and a telephone number. Docket 216-3 ¶¶ 6-7. Agents compared the entries and the telephone numbers in the ledgers to dates and times of known contacts with law enforcement and other cooperating individuals and confirmed the that the times and numbers in the ledgers are calls from clients making appointments with prostitutes. Id.

The price of these encounters is also based on the best available evidence: the admissions of three of Fong's employees—Thuy Truong, Jie Mu, and Laurence Lee. Docket 216-3 ¶¶ 11-12, 15. Each of these employees separately told law enforcement that the conspiracy charged $120 for sexual favors per half hour or $160 dollars an hour. Id.; PSR ¶ 18. These numbers are further corroborated by mathematical calculations which appeared throughout the journals involving the multiplication of 160 and 120. Docket 216-3 ¶ 8.

The government totaled the proceeds generated by the encounters documented in the ledgers ($1,535,370) divided by the number of days of business activity recorded in the ledgers (708 days) to calculate an average of proceeds earned per day ($2,168.60) and per month ($65,058). Docket 216 8:19-23. To see if the records were a representative sample, the government compared early records to later records and determined that the enterprise's prostitution activities did not decline over time, and its activities appear to have increased over time. Docket 216 8:11-15.

The evidence shows that Fong was involved in with the enterprise from at least October 2, 2003 through October 23, 2014, when Fong was arrested with a prostitute at an enterprise brothel. Docket No. 227 Page 10 ¶ 14 and Page 3 ¶ 19. To provide a more conservative estimate, the government decided not to seek forfeiture for proceeds earned beyond July 2014, the end date Fong admitted in his open plea. *See* Factual Basis for Allen Fong Open Plea p.8. To account for the possible increase in prostitution activity over time—and the corresponding possibility that the pre-journal activities generated less revenue—the government decided not to seek forfeiture for proceeds generated before the start of the ledgers (October 24, 2007), leaving the government with an 81-month period (from October 24, 2007 through July 2014). Docket 216 9:8-12. The government then multiplied the monthly rate ($65,058) by 81 to calculate the total proceeds ($5,269,698). Docket No. 216-2 ¶ 11.

This is exactly the sort of calculation endorsed by the First and Eighth Circuits. *See* United States v. Pierre, 484 F.3d 75, 86 (1st Cir. 2007) (affirming money judgment based on co-conspirator's estimates of drug proceeds collected per week over course of conspiracy); United States v. Prather, 456 Fed. Appx. 622, 626 (8th Cir. 2012) (upholding a district court's determination of a forfeiture amount that was based on statements the defendant made about the amount of cocaine sold).

The defense argues that the government erred, because its calculation does not include ledgers kept by a single prostitute who appears to have charged $60, $80, or $100 for unknown services. Docket No. 252 4:13-20. The government explained in its application that it did not base its estimate on the ledgers, because they were generated by a single prostitute, as opposed to the proceeds generated by the organization as a whole. Docket 253 page 3. There is no evidence of what services were provided in exchange for the reduced rate provided by that prostitute. There is no evidence of what percentage of

Fong's enterprise that prostitute represented. As such, any extrapolation from those ledgers would be uninformed speculation. Further, the government took ample steps to arrive at a conservative estimate, such as declining to seek forfeiture of proceeds earned from October 2, 2003 (the start of the conspiracy) through October 23, 2007 (the first date in the ledgers) and from August 1, 2014 through October 23, 2014 (the proceeds earned after July 2014, the erroneous end date in Fong's open plea).

Fong, as the head of the Enterprise, had the opportunity to provide evidence to support a lower number of encounters or a lower price per encounter, but instead has provided no evidence to the contrary, despite missing the deadline to file an opposition to the forfeiture application and then receiving a two-month extension to do so. *See* Docket No. 236.

Because the uncontroverted evidence on the record supports the government's application of forfeiture in the amount of $5,269,698, the Court should order a forfeiture judgment in that amount.

III. The Forfeiture of Proceeds, which is Half of the Maximum Allowable Fine, is not Excessive

"[T]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." Bajakajian, 524 U.S. 321, 334 (1998). "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." Id. at 327-28. While courts are not restricted to any rigid set of factors, they have typically considered four factors in weighing the gravity of the defendant's offense: (1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused. United States v. $132,245.00, 764 F.3d 1055, 1058 (9th Cir. 2014); United States v. Mackby, 339 F.3d 1013, 1016 (9th Cir. 2003).

For more than 10 years, Fong was the head of a conspiracy involved in racketeering, prostitution, money laundering, and human trafficking. During that time, the enterprise operated over forty brothels in 13 different cities which committed over 10,000 confirmed acts of prostitution during the two-years of records obtained by the government. *See* Docket No. 1 63:7-26; Docket No. 216-2 ¶¶ 8-9. While the defendant attempts to paint himself as some kind of model pimp, the Supreme Court has acknowledged that those who traffic prostitutes "trade in human misery" and "[t]he private pain and public costs imposed by . . . prostitution, and human trafficking are beyond contention." City of Los Angeles v. Patel, 135 S. Ct. 2443, 2461 (U.S. 2015).

The maximum penalties that may be imposed for Fong's crimes confirm their significance. For each of the 18 counts of RICO and money laundering, the maximum penalty is 20 years. The 13 prostitution charges have a maximum penalty of 5 years each, and the conspiracy to transport/import aliens for immoral purposes carries a 10-year maximum. Additionally, Congress has authorized fining defendants such Fong who have been convicted of violating 18 U.S.C. § 1962 in an amount of "not more than twice the gross profits or other proceeds" obtained from their illegal racketeering activity. 18 U.S.C. § 1963(a).

In addition to the charges to which Fong admitted, it appears likely that that Fong was also guilty of filing false tax returns. From 2007 through 2013, Fong reported a total of $244,668.20 in income on his tax returns, or just under $35,000 a year. PSR ¶ 99. However, an analysis of bank deposits during that time show $2,800,000—$1,804,600 of which was cash—was deposited into accounts held or controlled by Fong during that period, or just over $400,000 a year. Docket No. 232-3 ¶ 8. This discrepancy is highlighted by the fact that Fong owns a home and an apartment building with a combined value of $3,500,000, with a total $2,840,710 in equity. PSR ¶ 100.

Courts in the Ninth Circuit have repeatedly upheld forfeitures in the face of excessive fines allegations when the forfeiture is below the statutory maximum fines for the crimes. S*ee* United States v. Beecroft, 825 F.3d 991, 1001 (9th Cir. 2016) (upholding forfeiture on counts were the amount was under the statutory maximum, and reversing where the amount was above the statutory maximum); United States v. $132,245.00, 764 F.3d 1055, 1060 (9th Cir. 2014) (upholding forfeiture order that fell "far below the maximum statutory fine" and was "only 2.6 times the maximum" Guidelines fine); *see also* United States v. Mackby, 339 F.3d 1013, 1018 (9th Cir. 2003) (upholding civil forfeiture order ten times greater than maximum Guidelines fine); United States SEC v. Brookstreet, 2016 U.S. App. LEXIS 20494 (9th Cir. Cal. Nov. 15, 2016) (finding $5.88 million civil penalty not excessive was not excessive when less than the $6 million in treble damages authorized by law). For violation of 18 U.SC. § 1962(d), the maximum fine authorized by 18 U.S.C. § 1963(a) is "not more than twice the gross profits or other proceeds" of the offense. As such, the forfeiture of the proceeds of the enterprise is half of the statutory maximum. This amount bears a direct relationship to the gravity of the offense that it is designed to punish and is not grossly disproportional.

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Respectfully submitted,

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